satisfactory evidence indicating whether that decision was merely to perform an act of eviction on behalf of the turf club and which the turf club by its own servants could lawfully have done, or whether the decision was prompted by a desire to prevent a possible breach of the peace which might occur if servants of the turf club themselves evicted him.

The letter P.3 was sent over the signature of the respondent but the order of exclusion which it communicated was the act of the committee of the turf club not of the respondent. The learned judge found, and there was evidence on which his finding is justifiable, that the telephone call which was the proximate cause of the visit of the police to the public enclosure of the turf club was not made by the respondent. If the respondent did not make that call then in my view any semblance of a case against him falls to the ground.

In the absence of evidence as to the reasons which led to the decision of the police to take steps to remove the appellant from the turf club premises there is insufficient evidence in my opinion to find, even assuming the turf club could be regarded as sued through its secretary, that the turf club caused the appellant's removal.

For the reasons which I have already set out, I would dismiss this appeal with costs.

Barakbah L.P.: I have had the advantage of reading the judgment of Pike C.J. Borneo. I agree with everything he has said and have nothing to add.

Azmi C.J. (Malaya): I have had the opportunity of reading the judgment of the Chief Justice, Borneo and I agree that the appeal be dismissed with costs for reasons given there.

Appeal dismissed.

MUNUSAMY v. PUBLIC SERVICES COMMISSION

[P.C. (Lord Morris of Borth-y-Gest, Lord Hodson & Lord Wilberforce) July 12, 1966]

[Privy Council Appeal No. 50 of 1964]

Constitutional Law — Public services — Restriction on dismissal and reduction in rank — Position of probationer — Reversion not amounting to reduction in rank — Constitution of Malaysia, arts. 132(1) & 135(2), (3).

Article 135(2) of the Constitution of Malaysia provides that no member of the general public service "shall be dismissed or reduced in rank without being given an opportunity to be heard."

The appellant who had previously been employed as an immigration officer was appointed assistant passport officer in the External Affairs Service on his acceptance of the terms of a letter which stated *inter alia* that ". . . the appointment will extend for a period of three years in the first instance. . . . You will be required to serve a probationary period of one year from the date of your appointment and subject to your work and conduct being satisfactory you will be eligible for confirmation in your appointment at the end of this period." One of the conditions laid down in the advertisement for applications was that candidates should have passed the school certificate examination. The appellant did not have the requisite school certificate but he stated in his application that he had passed that examination, and when that was discovered the respondent commission, without giving the appellant the opportunity of being heard, terminated his appointment during the probationary year and reverted him to his former post. The appellant applied, *inter alia*, for an order of *certiorari* to quash the commission's decision on the ground that under the Constitution his employment could not be terminated without giving him an opportunity of being heard. Ong Hock Thye J., as he then was, dismissed the application ([1960] M.L.J. 221) and the Federal Court upheld his decision ([1964] M.L.J. 239). On appeal to the Privy Council,

Held: (1) article 135(2) of the Constitution was concerned with the right to be heard in respect of disciplinary offences and applied only when dismissal or reduction in rank was inflicted in circumstances involving the imposition of a punishment or penalty. Penal consequences or punishment existed if an order for the reduction of rank of a member of a public service entailed or provided for forfeiture of pay or allowances, loss of seniority in substantive rank, or the stoppage or postponement of his future chances of promotion. In this case there has been no reduction of rank enabling the appellant to rely on the provisions of article 135(2) and so obtain a hearing for the reason that the action of the respondent could not be characterised as being by way of punishment;

(2) the appellant was in any event appointed to the rank of assistant passport officer only as a probationer so that he could be reverted to his substantive rank of immigration officer without the question of reduction of rank arising for consideration notwithstanding the statement in the letter that subject to his work and conduct being satisfactory he would be eligible for confirmation in his appointment at the end of the period. "Eligible for" is not equivalent to "entitled to" and means no more than "fit to be chosen for."

Cases referred to:—

(1) *High Commissioner for India & High Commissioner for Pakistan* v. *Lall* (1948), 75 I.A. 225, 237.

(2) *Parshotam Lal Dhingra* v. *Union of India* [1958] S.C.R. 828.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Satish Chandra Anand* v. *Union of India* [1953] S.C.R. 655; *State of Bihar* v. *Gopi Kishore*, A.I.R. 1960 S.C. 689; *Shyam Lal v. State of Uttar Pradesh*, [1955] S.C.R. 26; *State of Orissa* v. *Ram Narayan Das*, A.I.R. 1961 S.C. 177; *Sukhbans Singh* v. *State of Punjab*, A.I.R. 1962 S.C. 1711; *Gopal* v. *State of Punjab*, A.I.R. 1963 S.C. 531; *Banerjee* v. *Union of India*, A.I.R. 1963 S.C. 1552; *Jagdish Mitter* v. *Union of India*, A.I.R. 1964 S.C. 449; *Champaklal Chimanlal* v. *Union of India*, A.I.R. 1964 S.C. 1854; *McLelland* v. *New Zealand Health Board*, [1957] 2 All E.R. 129.

PRIVY COUNCIL APPEAL.

E. F. N. Gratiaen Q.C. and *Walter Jayawardena* for the appellant.

Lord Bledisloe Q.C. and *P. G. Clough* for the respondent.

The judgment of their Lordships was delivered by,

Lord Hodson: This is an appeal from the judgment of the Federal Court of Malaysia dated February 21st 1964 dismissing (Lord President Thomson dissenting) the appellant's appeal from the judgment of Ong Hock Thye J. dated May 3rd 1960 refusing the appellant's application for an order of *certiorari* and mandamus.

The appellant prayed for an order to quash a decision of the Public Services Commission, the respondent to this appeal, terminating his appointment as a Probationary Assistant Passport Officer in the External Affairs Service of Malaysia.

The appellant also sought as consequential relief an order of "mandamus" requiring the respondent to reinstate him in the post from which they had removed him, but this application is no longer pursued.

The appellant was given no opportunity of being heard in his own defence before his appointment was terminated and he maintains that under the Constitution his employment could not be terminated without such opportunity having been given to him. The following Articles contained in Part X of the Constitution of Malaysia under the heading of "Public Services" are material.

"132. (1) For the purposes of this Constitution. the public services are —

. . . (c) The general public service of the Federation;

135. (1) No member of any of the services mentioned in paragraphs (b) to (g) of clause (1) of Article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank.

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

(3) No member of any of the services mentioned in paragraphs (e), (f) or (g) of clause (1) of Article 132 shall, without the concurrence of the Judicial and Legal Service Commission, be dismissed or reduced in rank or suffer any other disciplinary measure for anything done or omitted by him in the exercise of a judicial function conferred on him by law.

139. (1) There shall be a Public Services Commission, whose jurisdiction shall, subject to Article 144, extend to all persons who are members of the services mentioned in paragraphs (c) and (f) of clause (1) of Article 132. . . .

144. (1) Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a Commission to which this Part applies to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control over members of the service or services to which its jurisdiction extends."

By virtue of the Eleventh Schedule to the Constitution, Article 160, the power to appoint includes the power to dismiss. The crucial article for the purposes of the appeal is 135(2) which places a Constitutional limitation on the power to dismiss a public servant such as the appellant.

The facts leading up to this application are these:—

Advertisements were issued in the *Malay Mail* and the Malaya Government *Gazette* on the 19th February and the 7th March respectively inviting applications for the post of Assistant Passport Officer for service in the Federation of Malaya Government Overseas Missions. Applicants would be selected according to the following order of preference:—

(i) Serving Assistant Passport Officers and serving Junior Assistant Passport Officers in the immigration department who have had not less than five years' service and possess School Certificate.

(ii) All serving Government officers who have had five years' service and who possess School Certificate.

(iii) Persons not in Government Service who have School Certificate with a credit in English, and who have attained the age of 22 but have not attained the age of 30.

Applications were to be made to the Secretary, Public Services Commission (Designate). After the date of the advertisements and until Merdeka Day (31st August 1957) this Commission consisted of a body nominated by the Government of the Federation of Malaya which it was intended should constitute the Public Services Commission on Merdeka Day when the Constitution came into operation. Prior to Merdeka day the Public Services Commission (Designate) dealt in an advisory capacity with applications for Federal Government appointments but these were actually made by the Chief Secretary to whom the powers of the High Commissioner had been delegated, the High Commissioner's powers being contained in and regulated by the Federation of Malaya Agreement 1948. After Merdeka day the relevant powers passed to the respondent under the Constitution. See Articles 162(1) and 167 dealing with Temporary and Transitional Provisions.

On February 21st 1957 the appellant who was a serving Government officer with more than five years' service as an Immigration Officer submitted an application for the post of Assistant Passport Officer advertised in the *Malay Mail.*

The letter of application contained this sentence "I have passed my School Certificate and have been in Government service for the past seven years."

The appellant had in fact not passed his School Certificate but held only a Leaving Certificate dated the 14th December 1949 signed by the principal of the Methodist Boys' School, Kuala Lumpur, which includes the words

"Standard at time of leaving: Sch. Certificate Class (Camb)." The appellant duly appeared before an interview board, whether bringing with him his Leaving Certificate or not is not clear, and following on the interview he received a letter from the Deputy Chief Secretary offering the appointment. This letter was dated August 21st 1957 and the material parts read as follows:—

"I am directed to inform you that you have been selected for appointment as an Assistant Passport Officer in the External Affairs Service. The date of appointment will be the date of your embarkation for your overseas post and the appointment will extend for a period of three years in the first instance.

. . .

4. You will be required to serve a probationary period of one year from the date of your appointment and subject to your work and conduct being satisfactory you will be eligible for confirmation in your appointment at the end of this period.

. . .

6. I am to enquire if you accept appointment on the Terms and Conditions stated above."

The appellant accepted the offer and on the 25th August 1957 he left for Karachi to take up the post of Assistant Passport Officer in the offices of the High Commissioner for the Federation of Malaya in Pakistan. Four days later the Constitution and with it the respondent which is the Public Services Commission came into being.

Subsequently police enquiries were made which resulted in the appellant being recalled from Karachi and charged under the Penal Code with giving false information in his application for appointment as Assistant Passport Officer in that he had stated that he had passed the School Certificate Examination.

The appellant was acquitted and his acquittal was confirmed on appeal. Pending the appeal the appellant was interdicted from duty by the Controller of Immigration but this matter need not be further discussed as there is no longer any question of a wilful misrepresentation having been made by the appellant and no further proceedings of a penal nature have been taken against him.

On the 23rd May 1958 however the Secretary to the respondent Commission sent to the appellant a letter in the following terms:—

"I am directed to refer to Chief Secretary's Office letter under reference CSO 58/28 dated the 21st August, 1957 notifying you of your selection for the above mentioned post and also to your acceptance of the appointment.

2. I am to say that it has come to the knowledge of this Commission that you have not passed the School Certificate required as claimed by you and that you are therefore under-qualified for the appointment. After due consideration of the circumstances and of the necessity to maintain the standards of the External Affairs Service and in fairness to other properly qualified candidates and appointees, it has been decided to terminate your appointment as Assistant Passport Officer, External Affairs service on probation, with effect from the date of this letter.

3. You will revert to your former post in the immigration department on the terms and conditions under which you were serving before appointment to the External Affairs Service."

The main question for determination on the appeal is whether the respondent's termination of the appellant's appointment reverting him to his previous post of Immigration Officer under these circumstances amounted to dismissal or reduction in rank for the purposes of clause (2) of Article 135 of the Constitution.

The good conduct and efficiency of the appellant has not been called in question nor have his *bona fides*. The sole ground upon which the respondent claims to have acted is that the appellant was, as it is said, "under qualified" having regard to the terms of the advertisement in response to which he made his application. The admitted fact is that he did not have the requisite school certificate.

The terms of his appointment will be referred to again later but it is clear that there was no question of punishment involved and the respondent's contention is that it is clear from the history of the relevant legislation and from the terms of the Constitution itself that Article 135(2) is concerned with the right to be heard only in respect of disciplinary offences. In acting as it did the respondent was, it is said, not acting in a judicial capacity but performing an administrative act within its discretionary powers.

Their Lordships' attention was drawn to the Public Officers (Conduct and Discipline) Regulations 1956 made under the Federation of Malaya Agreement 1948 and kept in being by the Constitution. Under the heading of "Disciplinary Procedure" Regulations were made for the case of officers both on the non-pensionable and on the pensionable establishment in which the dismissal of an officer is contrasted with lesser punishment. It is sufficient to refer to one of these regulations, 37(h), which provides "In lieu of dismissal the Disciplinary authority may inflict such less penalty by way of fine, reduction in rank or otherwise as may seem to him fit". . . . Dismissal is treated as the penal consequence of charges meriting dismissal being established against an officer. Looking at the Constitution itself the disciplinary interpretation of dismissal is reinforced by the language of 135(3) which immediately follows the relevant Article and contains the significant phrase "dismissed or reduced in rank or suffer any *other* disciplinary measure." This confirms that the punishment element is involved in both cases and is not to be explained away as referring only to persons exercising judicial functions.

The Indian cases decided on the interpretation of Article 311 of the Constitution of India are of persuasive authority. This Article reads:—

"311. (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

Dismissal and removal are synonymous: see *High Commissioner for India & High Commissioner for Pakistan* v. *Lall* [1] at p. 237.

Article 311 qualifies Article 310(1) which reads:—

"Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of the State or holds any civil post under a State holds office during the pleasure of the Governor . . . of the State."

The effect of these Articles has been considered in a number of Indian cases to only one of which their Lorships think it necessary to refer. This is the case of *Parshotam Lal Dhingra* v. *Union of India* [2] in which a comprehensive judgment was delivered in the Supreme Court by S. R. Das C.J., who gave judgment with which Venkatarama Aiyar, S. K. Das and A. K. Sarkar JJ. agreed, Bose J. delivering a separate judgment.

The appellant in that case was appointed to the Indian Railway Service as a signaller and was promoted to the post of Chief Controller in 1950, both posts being in Class III service. In July 1951 he was appointed to officiate in Class II service as Assistant Superintendent Railway Telegraphs. In July 1953, following upon an adverse confidential report, the General Manager, without hearing the appellant, relieved him appointing another officer in his place said to be "vice Shri Parshotam Lal Dhingra who on relief reverts to Class III appointment." The single judge of the High Court who heard the appellant's complaint against the order held that it was invalid since the provisions of Article 311(2) had not been complied with. The Division Bench reversed the single judge on appeal and the question for decision by the Supreme Court was whether the order of the General Manager amounted to a reduction in rank within the meaning of the Article. It was held that the Order of reversion did not amount to a reduction in rank within the meaning of Article 311(2) of the Constitution and he was not entitled to the protection of the Article.

The Supreme Court laid down that the Article applied only when dismissal, removal, or reduction in rank is inflicted under circumstances involving the levelling of some imputation or charge against the servant and the imposition of punishment or penalty. It also decided that penal consequences or punishment exist if an order for the reduction of a member of a public service entails or provides for forfeiture of pay or allowances, loss of seniority in substantive rank, or the stoppage or postponement of his future chances of promotion. It further decided that all members of a public service are protected when punishment is involved without distinction between permanent and temporary posts and that dismissal or reduction in rank from a substantive appointment involves penal consequences and brings the Article into operation whereas reduction from an officiating to a substantive rank will not ordinarily be regarded as a punishment.

The Indian Constitution contains no provision corresponding to Article 135(3) of the Malaysian Constitution which, as has been already stated, strengthens the view that "dismiss" relates to disciplinary action.

There is no question of dismissal from the service in this case which must if the appellant is to succeed be a case of a reduction in rank. In India it has been held in *Dhingra's* case, *supra*, that a reduction in rank must be a punishment if it carries penal consequences with it and the two tests to be applied are (1) whether the servant has a right to the post or the rank or (2) whether evil consequences such as forfeiture of pay or allowances, loss of seniority in his substantive rank, stoppage or postponement of future chances of promotion follow as a result of the order. Applying these tests to this case there has been no reduction of rank enabling the appellant to rely on the provisions of Article 135(2) of the Constitution and so obtain a hearing for the reason that the action of the respondent cannot be characterised as being by way of punishment.

The letter of appointment is not wholly clear in its terms but their Lordships are of opinion that the appellant was in any event appointed to the rank of Assistant Passport Officer only as a probationer so that he could be reverted to his substantive rank of Immigration Officer without the question of reduction of rank arising for consideration notwithstanding the statement in the letter that subject to his work and conduct being satisfactory he would be eligible for confirmation in his appointment at the end of the period. "Eligible for" is not equivalent to "entitled to" and means no more than "fit to be chosen for."

Their Lordships will therefore report to the Head of Malaysia their opinion that the appeal should be dismissed and that the appellant should pay the costs of the respondent of the appeal.

Appeal dismissed.

Solicitors: *T. L. Wilson & Co.; Wray, Smith & Co.*